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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL EUGENE WESTON, Defendant and Appellant.	C082763 (Super. Ct. No. CRF152690)

A jury convicted defendant Gabriel Eugene Weston of first degree residential burglary (count 1; Pen. Code, § 459)[1] and receiving stolen property valued at greater than $950 (count 3; § 496), but was undecided on the charge of vehicle theft, as to which the trial court declared a mistrial (count 2; Veh. Code, § 10851, subd. (a)). The court found the dwelling was occupied (§ 667.5, subd. (c)(21)), and defendant had

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1 Undesignated statutory references are to the Penal Code.

a prior serious felony conviction and a prior prison term (§§ 667, subd. (a)(1), 667.5, subd. (b)).[2]

Defendant was sentenced to serve a state prison term of 14 years consisting of the four-year middle term on count 1 doubled, plus five years consecutive for the prior serious felony and one year consecutive for the prior prison term, with sentence on count 3 stayed under section 654.

On appeal, defendant contends: (1) the verdict must be reversed because the trial court failed to conduct an adequate inquiry into the jury's exposure to a tainted exhibit; (2) insufficient evidence supports the conviction for first degree burglary; (3) the trial court abused its discretion in sentencing; and (4) the matter must be remanded for the trial court to exercise its discretion as to whether to strike the five-year enhancement for defendant's prior felony conviction pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1-2, eff. January 1, 2019, amending §§ 667, subd. (a)(1), and 1385, subd. (b) (SB 1393)). We shall remand for that purpose and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose from the burglary of a house and the theft of a vehicle parked in front of the house on the night of May 5 or the early morning of May 6, 2015,[3] followed by an attempt on May 6 to pawn property stolen from the house.

P.C., his wife A.F., and their children lived in a two-story house in Davis, where they all slept upstairs. On May 5, they were asleep by 10:30 p.m.

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[2] Defendant was tried along with codefendants Andres Navarro and Mohamed Husien; codefendant Jessica Cruz's matter was severed from this proceeding. Navarro was convicted on all counts, but Husien obtained a mistrial on all counts.

[3] Subsequent dates are in 2015 unless otherwise stated.

On May 6, P.C. awoke before 6:00 a.m. and went downstairs to make coffee. When A.F. came down to join him, she asked where the television was. They discovered P.C.'s work cell phone, his work computer and bag, his wallet, and associated gift cards and cash were also missing, as were sunglasses, video games, Xbox and Nintendo Wii video game consoles, video game controllers, a digital camera, an associated memory card and charging cable, and a Sonos Wi-Fi speaker. In addition, P.C.'s red Toyota Highlander that had been parked in front of the house, was gone. P.C. found no signs of forced entry. He immediately reported the burglary to the police, who also found no signs of forced entry or fingerprints.

Knowing the front door lock had not been changed when his family moved into the house, P.C. realized someone must have had a key. He replaced the lock and threw the old lock in the garbage.

The Interviews and Searches

Eva Lopez, the girlfriend of codefendant Navarro, had previously lived with her mother and stepfather in the burglarized house. Interviewed by Davis Police Officer Jeff Vignau on May 7, she said Navarro asked her sometime in April why she carried so many keys on her key ring, and she explained that two were from her prior residence. About a week later, she and Navarro drove by the house and she pointed it out to him. According to her stepfather's testimony about the story she told him, Navarro dared her to find out if the keys still opened the door. Soon after, Navarro took them from her, saying she did not need them anymore. She did not know what he did with them.[4]

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[4] The jury did not hear how the police learned Eva Lopez possessed a key to the burglarized house. The probation report states police received an anonymous tip giving that information and tying Navarro and the other defendants to the crimes.

Corporal Stephen Ramos interviewed Navarro on May 7 and seized a cell phone and a lanyard with keys from him. Corporal Ramos gave the keys to Davis Police Officer Loralee Cox to take to the burglarized house. At the house, she found that one of the keys opened the discarded lock.

Officer Cox returned to Navarro's apartment complex and found the stolen Toyota Highlander in the parking lot. Entering the car through the unlocked doors, she found a key ring with keys that proved to belong to the vehicle, and a remote key fob on the floorboard.

Later that day, Davis Police Sergeant Michael Munoz conducted a parole search of Navarro's apartment and found property believed to have been taken from the burglarized house, including a black backpack containing a Lenovo computer and two keys, a charger, a digital camera, and a memory card with photographs of P.C. and A.F.

Sergeant Munoz then went to defendant's home in Davis with other officers. Searching defendant's mother's white Volkswagen station wagon, Sergeant Munoz saw a USB cable in the rear seat, which could have been related to a digital camera stolen from the burglarized house, and a latex glove partly sticking out of the front passenger seat's back pocket. Officers found more latex gloves in defendant's bedroom.

Defendant's mother told Sergeant Munoz that on May 5, defendant said goodnight to her around 9:00 p.m. Waking up between 11:00 p.m. and 2:00 a.m., she noticed her station wagon was missing and assumed defendant had taken it. In the morning, she found her car in the driveway.

At codefendant Husien's apartment, where he shared a bedroom with Cruz, Sergeant Munoz found Cruz's purse that contained wallets belonging to P.C. and A.F. Sergeant Munoz also seized Husien and Cruz's mobile phones and items believed to have been taken from the burglarized house.

Officer Vignau interviewed defendant, Husien, and Eva Lopez about the burglary. The audio recording of defendant's interview was played for the jury and is in the appellate record, along with a transcript.

After reading defendant his *Miranda* rights, Officer Vignau said defendant was under arrest "for something that happened on Tuesday night." Defendant responded: "I wasn't even in Davis on Tuesday." Told it was "a burglary and an auto theft," defendant said: "I wasn't involved in going into . . . any house." Defendant said he, Husien, and Cruz were in Berkeley on Tuesday night and Wednesday; they drove there in Husien's BMW, then visited a pawn shop where Cruz tried to pawn some jewelry.

Telephone and Text Communications

In the course of the investigation, Sergeant Munoz obtained telephone records for the defendants' mobile phones. A police technician analyzed the calls made on the phones by downloading and extracting information from them, then prepared a 2,496-page report (described as "inches thick"), offered as People's Exhibit 47. The report included a "call log," documenting incoming and outgoing calls (including missed calls) from each phone, the phones to or from which the calls were made, and the length of time each call lasted. The numbers for the phones showed the name of the person associated with the phone (in defendant's case, his mother).

The records revealed that between March 17 and May 7, there were 44 calls between Husien and defendant's phones, all but three of them on or after April 25. There were also 25 calls between Husien and Navarro between April 26 and May 7. The last call among the defendants before the probable time of the burglary, made from defendant to Navarro, occurred at 9:34 p.m. on May 5.

At 11:55 p.m. on May 5, Navarro texted his sister asking her to leave the back door of their home unlocked. The police later found property stolen from the burgled residence in Navarro's bedroom.

At 4:11 a.m. on May 6, Navarro's phone records showed he was searching for information about a brand of hi-fi wireless speakers like those stolen in the burglary.

At 4:33 a.m. on May 6, Navarro and Oscar Velarde texted each other about whether Velarde could buy a laptop from Navarro.

At 8:46 a.m. on May 6, Cruz began researching how to lower the seats on a BMW, supporting the inference that the defendants intended to put the stolen 55-inch TV in Husien's BMW to take it to a pawn shop.

At 10:11 a.m. on May 6, Cruz began researching pawn shops in the local area, and Husien began calling pawn shops in Oakland and El Sobrante. At 11:45 a.m., as shown by a surveillance video that was played for the jury (People's Exhibits 40 and 41), defendant and Husien carried a 55-inch TV into a pawn shop in El Sobrante. As defendant gave his identification to the store manager and negotiated a price for the TV, Husien returned with a bag containing the Xbox and Wii gaming consoles; however, the pawn shop did not take these because the power cords were missing.

At 11:54 a.m. on May 6, Cruz texted friends offering to sell an Xbox.

Defense

The defendants did not testify.

DISCUSSION

I

Inquiry into Jurors' Exposure to Exhibit 47

Defendant contends: "The trial court's failure to conduct an adequate inquiry into jurors' exposure to the content of Navarro's text messages about [defendant]'s criminal propensity, criminal association, and likelihood of returning to prison within days of his release from prison requires the reversal of the entire judgment." (Capitalization omitted.) We conclude the trial court did not err, but even if it did any error was harmless.

BACKGROUND

Before trial, defendant moved in limine to exclude evidence of his criminal history and juvenile record. The trial court granted the motion.

As indicated above, the call log offered in evidence as People's Exhibit 47 contained a number of transcribed statements and texts by the defendants. The trial court and the parties tried to ensure material that might be unduly prejudicial to any defendant was removed before the exhibit went to the jury. The court directed the prosecutor to prepare a redacted version of Exhibit 47 to be given to the jury, and to put the material removed from that exhibit (consisting of only text messages) into a separate document, labeled Exhibit 47a, that the jury would not receive.

After deliberations began, the jury sent the trial court a question: "What is [Navarro]'s cell phone number? Are we able to get [his] call logs?" The court replied by giving the number, then stating: "*The call log for that telephone number was admitted into evidence as Exhibit 47a (relevant excerpts from Exhibit 47). The witness who testified about the call log was Janet Chaney of the Davis Police Department. You should have Exhibit 47a in the Jury Room.* [¶] Please note that to the extent any of the text messages in Exhibit 47a appear in the Spanish language, you are instructed to disregard the language and not to interpret the language into English. There was no official translation so you must not translate on your own. Thank you." (Italics added.) In other words, the trial court confused Exhibits 47 and 47a.

The jury's next question made this clear: "The Exhibit 47a is only text messages and no call logs. We would like a read-back if we cannot get the call logs of 47a from Janet Chaney." At this point, the trial court and counsel realized the redacted material labeled Exhibit 47a had mistakenly been furnished to the jury.

The trial court proposed to instruct the jury that Exhibit 47 was the correct exhibit and to disregard anything it may have read in Exhibit 47a.

Defendant's counsel asserted that Exhibit 47a contained texts in which Navarro had described himself and defendant as "partners in crime," had said defendant was on parole and had just gotten out of jail, and had added that defendant would probably be back in prison in two days. Defendant's counsel and Navarro's counsel argued that the trial court needed to inquire into whether the jurors had seen these texts. The court stated it would question the jury foreperson "as to the extent that the exhibit was reviewed." After counsel inspected the redacted Exhibit 47 to make sure it contained nothing improper, the court brought in the foreperson.

The trial court asked the foreperson: "[W]hat was the scope of your review of the exhibit? How much did you look at it?" The foreperson answered that the jury had reviewed the exhibit, "[c]hronological of the events that we were told based on the timeline."

The trial court asked how far into the exhibit the jury had gotten. The foreperson replied: "We've gone through what we -- it's hard to say exactly. We went through what we felt was relevant based on the timeline that both the [d]efense and [p]rosecution told us from beginning to end. So I'm not going to say we went through the entire packet, but we went through what was relevant."

The trial court asked whether the foreperson led the examination of the exhibit or whether it was passed around and different jurors had looked at it. The foreperson replied: "Different individuals. [¶]. . . [¶] And myself, too." Asked how many, the foreperson said: "[A]bout half."

The trial court asked how much time the jurors had spent on the exhibit. The foreperson answered: "I mean, it's been part of our looking back in references. I can't really say. Throughout the time we have been deliberating, potentially it's been looked at multiple times throughout that time."

The trial court said: "In other words, what you're telling me is, you didn't sit down for a block of a half hour and go through the exhibit. Someone would say, 'What happened on a certain date?' Look at the text messages." The foreperson agreed.

The trial court asked whether the jurors had seen anything in reviewing the exhibit that they had not heard testimony about: "Did something pop out and you say, oh, gosh, we didn't hear that, but it's here in the text messages[?]" The foreperson responded by citing only communications in Spanish that the jurors knew they had to disregard.

The trial court asked whether the jurors had learned anything else from the text messages. The foreperson replied: "It's possible. I can't say specifically because I know I can't think of specific instances where -- I mean, there was a lot in there that we started to go through and that was not necessarily testimony that was said. *I don't know if there was any of that, other than the Spanish section, that stood out to us*." (Italics added.)

The trial court excused the foreperson and allowed counsel to address the court.

Defendant's counsel stated: "I hate to say this, Your Honor, but if multiple jurors have looked at that, there's no guarantee that they told somebody what they saw. So I think we're in a position where we have to ask all the jurors these same types of questions . . . [¶] . . . [¶] and whether there's anything prejudicial in there against any of the [d]efendants that wasn't talked about in trial."

Navarro's and Husien's counsel also requested questioning all the jurors. The trial court agreed with Navarro's counsel that Exhibit 47a had been in the jury room from the start of deliberations.

The trial court stated: "I don't really see the need to [question all the jurors]. We had the foreperson explain exactly how the document was used. I asked him specifically what the deliberations were, and he identified the one Spanish text message and they

understand not to consider that. [¶] And it's just, to me we're just spinning our wheels and wasting time talking to everybody. This is an honest mistake."

The prosecutor stated: "Given the nature of the text messages that I know [defense counsel] were concerned about, it is my belief that they would have stood out to the foreperson had that issue been discussed as part of the jury as a whole." Therefore, the remedy already proposed by the trial court was sufficient.

The trial court ruled: "Right. So I'm willing to live on that. If it's a prejudicial error, so be it. I think it's not dispositive and highly disruptive to go to each juror and question them. It's dangerous to bring jurors in and ask them any substantive questions about deliberations. [¶] We had good cause to go this far, but on balance, it's not a practical thing to do. I'm comfortable there's been no taint here and so forth. Both the [d]efendants -- or all the [d]efendants made their record and made the request to speak to all the jurors, and that request is declined at this time. And we're ready to keep going as far as I'm concerned. So that's where we're at. [¶] Now, I do need to respond. And I apologize to the parties. I don't think there's been any harm here. You have your record, and if it gets reviewed, it gets reviewed. But I wouldn't be making this decision if I thought we were anywhere close to offending due process or any harm being done here."

The trial court then answered the jury's question in writing as follows: "Exhibit 47a was mistakenly sent into the Jury Room and referred to in my last note to you; it was not admitted into evidence. Please disregard Exhibit 47a and do not consider or discuss anything that you observed or learned from Exhibit 47a. [¶] Exhibit 47 is the correct Exhibit and it has been admitted into evidence and you should have it in the Jury Room. It should contain both the call logs you asked about and text messages and web history and call analytics. [¶] Please note that to the extent any of the text messages in Exhibit 47 appear in the Spanish language, you are instructed to disregard the language and not to

interpret the language into English. There was no official translation so you must not translate on your own."

ANALYSIS

"When a court perceives that the jury has been exposed to extraneous material, it is the court's duty to ascertain the nature of that evidence and its effect on the jurors' ability to deliberate impartially." (*People v. Williams* (1988) 44 Cal.3d 1127, 1156.) In doing so, however, the court must be mindful of "the need to protect the sanctity of jury deliberations [citation]" by avoiding an intrusive inquiry into jurors' thought processes. (*People v. Cleveland* (2001) 25 Cal.4th 466, 475 (*Cleveland*).) "Most of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes apply even more strongly when such inquires are conducted during deliberations. Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Id.* at p. 476.)

If the jury " 'innocently considers evidence it was inadvertently given [citation],' " as here, there is no jury misconduct, but merely "ordinary error." (*People v. Clair* (1992) 2 Cal.4th 629, 668.) Therefore, "prejudice must be shown and reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have resulted. [Citation.]" (*Ibid.*; accord, *People v. Jackson* (1996) 13 Cal.4th 1164, 1213-1214; see *People v. Gamache* (2010) 48 Cal.4th 347, 398-399.) So far as defendant argues for a reversal per se rule, we cannot consider that argument, as defendant concedes. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Faced with possible exposure to certain text messages, the trial court handled the matter with proper regard for the need to balance ascertaining the facts and respecting the

sanctity of deliberations. The court and counsel knew at the outset what the jury might have been improperly exposed to. Unable to ask directly whether any juror had seen the problematic text messages, the court asked open-ended questions that prompted the foreperson to mention those texts spontaneously if he or she thought any juror had considered them. The foreperson not only did not do so, but reiterated that nothing came to mind other than the Spanish texts the jury knew it was not to consider. At that point the court knew as much as it could reasonably hope to learn without invading individual jurors' thought processes and running the risk of adversely affecting deliberations. (*Cleveland, supra,* 25 Cal.4th at p. 476.) And what the court knew strongly suggested it was unlikely any juror had spotted the prejudicial matter.

Furthermore, questioning all the jurors individually might have yielded no more information, while producing undesirable consequences. The trial court could not know whether every juror would answer its questions as candidly as the foreperson had done. However, the court could anticipate that focusing the jurors' attention on the fact that there might be material in Exhibit 47a they had not heard in testimony could inadvertently prompt them to reconsider what they had seen. If any juror had seen the prejudicial texts, such questioning might actually have brought that evidence more sharply to mind.

Thus, the trial court properly exercised its discretion by declining to question any juror other than the foreperson. Under all the circumstances, that was the course of action best calculated to ascertain the facts without unduly affecting the deliberative process.

Defendant relies on case law involving jury misconduct. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1410-1412; *People v. Bradford* (1997) 15 Cal.4th 1229, 1351-1352; *In re Carpenter* (1995) 9 Cal.4th 634, 653-655; *People v. Cissna* (2010)

182 Cal.App.4th 1105, 1116-1117.) Since there was no jury misconduct here, that case law is inapposite.

But even if we found the trial court erred, the error would be harmless because there is no reasonable probability defendant would have obtained a more favorable outcome if the error had not occurred. As we explain below, substantial evidence supports defendant's conviction on the only count he challenges.

II

Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support his conviction of first degree burglary. We conclude the evidence was sufficient.

In reviewing claims of insufficient evidence, we apply the substantial evidence standard, construing the evidence most favorably to the judgment and presuming the truth of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) The same standard applies in cases where the conviction depends mainly on circumstantial evidence. (*People v. Paz* (2017) 10 Cal.App.5th 1023, 1039 (*Paz*).) We may not reverse for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*Ibid*.)

Here, the evidence was sufficient to establish defendant's guilt on first degree burglary, whether as a perpetrator, an aider and abettor, or a coconspirator. The jury was properly instructed on the latter forms of liability.

There was a large and increasing number of telephone communications among the defendants in the weeks before the burglary, starting late in the month when Navarro obtained the keys to the burgled residence; this gave rise to the reasonable inference that defendants were coordinating their plans. Navarro, the apparent ringleader, did not have a car, but defendant had access to his mother's Volkswagen station wagon. The

Volkswagen was missing from defendant's mother's residence during the hours that included the likely time of the burglary. A surveillance video obtained from a car wash across the street from Navarro's apartment showed vehicles that could have been the Volkswagen and the stolen Toyota Highlander during that same time frame. Latex gloves, usable to avoid leaving fingerprints, were found in the Volkswagen, along with an item that could have come from the burgled residence; more latex gloves were found in defendant's bedroom. Defendant's leading role with codefendants Husien and Cruz to pawn property stolen from the residence is nearly impossible to explain on any hypothesis other than his participation in the burglary. Lastly, when told after his arrest that the crime was a burglary, he volunteered that he had not entered any house -- though it had not been mentioned that the burglary was residential. His admission of knowledge about the nature of the burglary revealed consciousness of guilt. Drawing all reasonable inferences in support of the judgment, as we must do, substantial evidence supported defendant's first degree burglary conviction.

III

Sentencing

Defendant contends the trial court abused its discretion in sentencing by imposing the middle term on count 1 (first degree burglary). Not so.

BACKGROUND

The Probation Report

The probation report recommended a sentence of the middle term on count 1 (doubled for defendant's strike). Defendant's prior felony conviction prohibited probation and mandated a prison commitment. (§ 667, subds. (c), (e)(1).) The report found as circumstances in aggravation: the victims were vulnerable because they were asleep; the manner in which the crime was carried out indicated planning, sophistication, or professionalism; defendant's prior convictions as an adult and sustained petitions in

juvenile proceedings were numerous or of increasing seriousness; defendant had served a prior prison term; defendant was on parole when the crime was committed; and defendant's prior performance on probation was unsatisfactory. (Cal. Rules of Court, rule 4.421.)[5]

The report found no circumstances in mitigation under rule 4.423. However, under rule 4.408 (circumstances not exclusive), the report noted defendant was youthful (22 years old), had a lengthy history of polysubstance abuse, and also had an extensive and documented history of mental health issues. In the probation officer's view, factors in aggravation and mitigation under this rule "qualitatively balance," making the middle term appropriate.

Defendant's Sentencing Brief

Defendant requested the low term (two years doubled) on count 1. His counsel asserted that circumstances in mitigation included not only a mental condition that should reduce defendant's culpability (rule 4.423(b)(2)), but also acknowledgment of wrongdoing at an early stage (rule 4.423(b)(3)).

As to defendant's mental condition, counsel attached voluminous supporting documentation. In sum, the documentation showed as a youngster defendant had learning disabilities such as dyslexia and was diagnosed with anxiety disorder, depression, and impulsivity. Since then, he had also been diagnosed with bipolar disorder. Defendant began abusing substances in 2011, when he was 17. Shortly before he was charged in his first adult case, in September 2012, he was homeless because he was not taking his medications and his mother would not let him return to the house. Subsequent convictions included vehicle theft, "low-level misdemeanors," and finally

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5 Undesignated rule references are to the California Rules of Court.

first degree burglary while on probation. At that time he was homeless, abusing substances, not taking his medications, and physically ill.

On May 6, 2015, he acknowledged he needed to resume seeing his therapist and taking his medication. His mother had reached out to his parole agent several times before the current crimes, and also discussed defendant's deteriorating state with one of the investigating officers on May 7.

The People's Sentencing Brief

The People argued for the upper term, asserting that aggravating factors far outweighed mitigating factors. In addition to the aggravating factors cited in the probation report, the People cited rules 4.421(a)(9) (taking of great monetary value) and 4.421(b)(1) (conduct that indicates a serious danger to society). The People also disputed the mitigating factors relied on by defendant.

The People asserted defendant's mental condition did not "significantly" reduce his culpability because he "appears to use his conditions as a panacea to constantly avoid truly accepting responsibility for his behavior."

Lastly, the People disagreed with the additional factors in mitigation suggested by the probation officer. Despite defendant's youth, he had committed five felonies, including two strikes, since turning 18; four of them were theft-related, indicating he had chosen a career criminal path. His mental health condition did not count in mitigation for the reasons already stated. And there was no evidence linking his polysubstance abuse to his conduct in this case.

Sentencing

After hearing argument from counsel and a victim statement from A.F., the trial court stated:

"I look at the overall guidelines under Rule 4.410 for sentencing, and I'm really concerned here. I mean, he's going to do prison time, so he'll be in custody. So that

protects society. And he will be punished, and that's important for a serious crime like this. . . .

"I'm really focused on deterring others. . . . These types of crimes, going into homes late at night where innocent families are sleeping, are the type of crimes that stay with people for their whole lives, particularly children. . . . So that's a big deal.

"Preventing the [d]efendant from other criminal conduct is important here because he's just got a stream of crimes, and he committed this crime when he was out on parole shortly after release from prison, which is really shocking, and it weighs heavily on the Court that . . . the [d]efendant has never done well on probation and that he was on parole at the time, and those are certainly facts in aggravation that the Court takes quite seriously here.

"So those are the overall principles, and I think the most important ones are deterring others and giving this [d]efendant a cooling-off period. . . .

"When you look at the offense, what's really troubling here is how sophisticated it was. I mean, this was planned, and they knew exactly what they were doing. They were working in concert with three other individuals, and they went in at this time of night. And so . . . this offense was not just characterized like his other first-degree burglary where he went into a friend's house and maybe took one item.

"Here, they were classic burglars running around the first floor of the house while people were quietly s[l]eeping upstairs. So the offense is high end of seriousness for a first-degree burglary.

"Now, there are facts . . . in mitigation. He was willing to take an 11-year offer on the day of trial. And I do believe that the parties weren't able to negotiate fully because there were multiple [c]odefendants, and we know that [Husien] was blocking any sort of deal. . . . I do believe if there hadn't been a [Husien], that this case would have resolved earlier. And I think the [d]efendant did take some responsibility earlier in the process.

"I don't give a whole lot of weight to the drug addiction or the mental health. I'm very worried about the increase in seriousness here, his offenses . . . . The prior felony record he has is much less serious than what we have here. So increasing severity works as aggravation. Trying to resolve this earlier is mitigation. Drug addiction, mental health -- hard to weigh that. It cuts both ways, really. He is a danger to society, and . . . the fact that he was on parole and he failed probation is really troubling.

"There are two things that really jump out at me with respect to mitigation. He still is very young. . . . And the prior crimes didn't involve violence. . . . Even in this case, there were no weapons found on these individuals when they came in.

"I'm also reminded that I can't use dual use. I can't focus on the conduct that leads to the prior and the nickel prior in assigning the upper term here. . . .

"But I do want to give [defendant's mother] some acknowledgment here. Very difficult to come in. The Court found her trial testimony to be truthful and very compelling. The Court found that her supporting records on behalf of her son were very helpful to assess, and I've indicated that while they were detailed and so forth, those issues cut both ways. . . .

"So at this point, the Court has to balance all this. This case is either middle term or upper term. I don't see any way you get to lower term. So it's middle or upper term, and at this point, for the reasons I've said when I balance everything, the Court is willing to and will grant the middle term.

"And again, I'm emphasizing how young he was, and I'm emphasizing that there's no weapons in his criminal history and so forth. And I do believe . . . that while punishment is important, rehabilitation is important, too. And I don't think the upper, which would take this sentence to 18 years rather than the 14 that I'm going to impose[,] is warranted."

ANALYSIS

When making sentencing decisions, trial courts have wide discretion in weighing aggravating and mitigating factors. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582 (*Avalos*).) The court may rely on any aggravating circumstances reasonably related to its sentencing decision (*People v. Sandoval* (2007) 41 Cal.4th 825, 848) and need not explain its reasons for rejecting alleged mitigating factors (*Avalos*, at p. 1583). We review the court's sentencing choices for abuse of discretion. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978 (*Alvarez*).)

The trial court's thoughtful sentencing statement showed the court understood and balanced the relevant factors. Contrary to the prosecutor's position, the court acknowledged defendant's youth, his lack of violent offenses, his mental health problems, and his early admission of wrongdoing as factors in mitigation, and used those factors to reject the upper term. Contrary to the defense position, the court found those mitigating factors insufficient to get down to the low term, given the abundant aggravating factors the court also found. There was no abuse of discretion.

IV

Remand

We requested supplemental briefing on whether we should remand the matter for the trial court to exercise its newly granted discretion as to whether to strike defendant's five-year term for a prior felony conviction (Pen. Code, § 667, subd. (a)(1)), pursuant to SB 1393. The parties agree we should remand for that purpose. We shall do so.

DISPOSITION

The matter is remanded for the trial court to exercise its discretion whether to

strike defendant's five-year enhancement for a prior felony conviction. In all other respects, the judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
MURRAY, J.